No. 93-83

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ALVIN T. ADAMS, SR., *et al.*,

Petitioners,

v.

WALTER INDUSTRIES, INC., *et al.*,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Petitioners answered the bulk of respondents' arguments in the petition and will not reiterate those arguments now. However, a few matters raised for the first time in respondents' opposition require response.

First, respondents argue that certiorari is improper here because the legal standards governing the Seventh Amendment right to jury trial are settled and this case represents only an application of those standards to particular facts. Brief in Opposition ("Opp. Br.") at 8-9. If respondents were right, the Court would not have granted certiorari in the numerous jury trial cases decided since it settled on the jury trial standard in *Curtis v. Loether*, 415 U.S. 189, 194-196 (1974). *See, e.g., Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558 (1990);

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989); *Tull v. United States*, 481 U.S. 412 (1987). As these cases show, the Court's task does not end when it settles on a legal standard to use in determining whether a constitutional right has been violated. In the long-established tradition of common law case-by-case decisionmaking, it is ultimately for the Court to correct conflicts between the courts of appeals concerning whether there is a right to a jury trial for particular causes of action. The question whether there is a right to a jury trial in the many veil-piercing cases brought in the federal courts, like the questions whether there is a right to a jury trial in a duty of fair representation case or in a fraudulent conveyance case, *see Teamsters v. Terry* and *Granfinanciera, supra*, should be decided by the Court.

Second, respondents say that review by certiorari is improper here because: 1) the Court of Appeals' failure to write an opinion leaves uncertain the basis on which it denied mandamus; and 2) it would be improper to remand and require the Court of Appeals to explain the basis for its ruling. Opp. Br. at 7-9. Respondents' argument is an open invitation to the lower courts to evade review of their decisions by failing to write opinions. If their argument were accepted, the Court could never review a decision in which the lower court failed to issue an opinion because the basis for the decision would almost always be uncertain. That is not and can not be the law. If a case presents certworthy issues, as this case does no matter what ground the Court of Appeals rested its decision on, certiorari is proper. *See Taylor v. McKeithen*, 407 U.S. 191, 195 (1972) (Rehnquist, Burger and Powell, JJ., dissenting) ("[w]hile an opin-

ion from the Court of Appeals fully explaining the reason for its reversal of the District Court would undoubtedly be of assistance to our exercise of certiorari jurisdiction here, it is by no means essential"). Alternatively, the Court can summarily grant certiorari, reverse and remand with instructions for the Court of Appeals to explain the basis for its decision. *Taylor v. McKeithen*, 407 U.S. at 194.

Third, respondents argue that petitioners' characterization of the *Larned* class action below as one involving veil-piercing rather than a personal injury claim establishes that this case seeks equitable relief rather than damages. Opp. Br. at 13-14. *Larned* is not, of course, the proper measure of whether the relief respondents seek here, precluding any claim for damages against Jim Walter Corporation ("JWC") based on veil-piercing, is legal or equitable. *See* Petition at 21 n.13. Because this declaratory judgment action will preclude all damages claims against JWC based on veil-piercing, including the *Cimino* class action and hundreds of individual tort suits, it is legal in nature even if it will also preclude some equitable claims. All of respondents' eloquence about *Larned* cannot change the fact that if they prevail in the adversary proceeding no plaintiff will be able to pursue a claim for damages against JWC based on veil-piercing. Hundreds of legal suits for damages in which jury trials were demanded cannot be resolved in a non-jury trial simply because the defendant sues for declaratory relief that he is not liable. *See Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 504 (1959).

In any event, saying that *Larned* involves a veil-piercing claim does nothing to answer whether there is a right to a jury trial on such claims. Like this

case, *Larned* was a declaratory judgment action, and one must look to the claim that would have been brought absent the declaratory judgment remedy to determine whether the relief sought there is legal or equitable. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 284 (1988). In the absence of the declaratory judgment remedy, the veil-piercing allegations in *Larned* would have been resolved in *Cimino* and the hundreds of individual tort actions seeking damages against JWC on a veil-piercing theory. *Larned* thus involves legal relief, as does this adversary proceeding.

Fourth, respondents rely on *Dr. Salmon v. The Hamborough Company*, 1 Ch. Cases 204 (1671), to argue that veil-piercing was equitable in pre-1791 English law (Opp. Br. at 17-19) but ignore that *Dr. Salmon* had application only when a corporation had the power to make assessments on its shareholders. *See* Petition at 18 n.12. The leading English and American authorities agree that the omission of the power to assess shareholders in later corporate charters, intended to avoid the result in *Dr. Salmon*, left that case a nullity. *See* P. Blumberg, *The Law of Corporate Groups: Tort, Contract and Other Common Law Problems in the Substantive Law of Parent and Subsidiary Corporations* § 1.03.1 at 13 (1987); L. Gower, *Gower's Principles of Modern Company Law* 26 (4th ed. 1979); 8 W. Holdsworth, *A History of English Law* 204-05 (1926). In any event, the ability of a creditor to have a court compel a corporation to enforce obligations of the shareholders to the corporation, as in *Dr. Salmon*, has nothing to do with modern veil-piercing, which makes shareholders liable

for the corporation's obligations regardless whether they have unsatisfied obligations to the corporation.

Finally, respondents for the first time cite *Naylor v. Brown*, Rep. Temp. Finch 83, 23 Eng. Rep. 44 (1673), for the proposition that English equity courts "imposed trusts on shareholders who had taken corporate dividends or capital in fraud of creditors." Opp. Br. at 19-20. Respondents misread *Naylor*. The Court imposed no trust there. Instead, two trusts of corporate assets had been declared for the benefit of two groups of shareholders, one by a trustee of the corporation and one by the corporation itself, without making any provision for the corporation's creditors. *Naylor v. Godfrey*, 73 S.S. 55, 56 (1674).[1] The Court held that the trust declared by a trustee of the corporation was invalid because "a trustee of a corporation or other person cannot declare in favour of private members or of a stranger unless the corporation or the trustor join in the declaration, which here they did not." *Id.* Because the trust was invalid, the money had to be returned to the dissolved corporation and was therefore available to repay the corporation's creditors.[2] *Id.* However, the Court held that

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[1] This is a different report of *Naylor v. Brown* which provides a fuller version of the decision. *See* D. Jenkins, *Skimming the Pantomime Horse: Two Early Cases on Limited Liability*, 34 Cambridge L.J. 308, 308-09 (1975). The citation is to Volume I of the Selden Society's collection of *Lord Nottingham's Chancery Cases* (D.E.C. Yale ed. 1957).

[2] The Court went on to hold that the shareholders, who were also creditors, were subordinated to the non-shareholder creditors "on the ground of fairness." D. Jenkins, *Skinning the Pantomime Horse*, 34 Cambridge L.J. at 311. The judge was, however, "not very confident that his decision was sound; his final ruling [in a later decision in the same dispute] was: 'let

the other trust for corporate shareholders was valid because the corporation had joined in the declaration of trust notwithstanding that "otherwise it seemed to me a fraudulent proceeding like that of a bankrupt who, forseeing he shall break, pays what friends he likes best." *Id.* In short, the case turns on the "technical ground[]" that the corporation had not joined in one declaration of trust for shareholders but had joined in the other. D. Jenkins, *Skinning the Pantomime Horse*, 34 Cambridge L.J. at 310. If anything, the case establishes that equity courts would *not* interfere when a corporation distributed its assets to shareholders without providing for creditors so long as the technical formalities were observed.

The other citations respondents rely upon for the equitable origin of the "corporate trust fund" doctrine are 19th-century American authorities. Opp. Br. at 19 n.8. They say nothing about whether the doctrine was recognized by the English equity courts before 1791, the question relevant to the jury trial issue.

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the decree be confirmed to the end that the cause may come before the Parliament by appeal, where the example of this case will be fit to be considered.'" *Id.*, at 311-12, *quoting*, *Brown v. Naylor*, 73 S.S. 419 (1676). Whatever the merits of the judge's decision to subordinate the shareholder-creditors, it has nothing to do with imposing trusts to recover corporate assets from shareholders, the point for which respondents cited *Naylor*.

The petition for a writ of certiorari should be granted to resolve the conflict in the circuits on the recurring question whether there is a right to a jury trial in an action seeking to pierce the corporate veil and to resolve the conflict in the circuits on the availability of mandamus to review denials of the right to jury trial.

Respectfully submitted,

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August 25, 1993